No. 78-1478

In the Supreme Court of the United States

OCTOBER TERM, 1978

STANLEY JAFFEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners filed this suit and asked the district court to order the United States to give medical examinations and free medical care to all servicemen compelled to be present at a 1953 atmospheric nuclear test at Camp Desert Rock, Nevada. Petitioners allege that the servicemen's presence at the test violated rights guaranteed by the First, Fourth, Fifth, Eighth, and Ninth Amendments to the United States Constitution. The district court dismissed petitioners' claim for medical examinations and medical care on the ground of sovereign immunity (Pet. App. 19-20). On an interlocutory appeal, the court of appeals affirmed (Pet. App. 21-37).[1]

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[1]The court of appeals reversed the district court's decision in one respect. The district court had dismissed petitioners' claim that the government be required to warn those exposed to the 1953 nuclear test of medical risk. The court of appeals held that this claim for prospective equitable relief is not barred by

Petitioners contend (1) that courts of equity have the authority to render "complete justice," including the issuance of orders requiring the government to undertake the expense of medical examinations and care (Pet. 11-12); (2) that the sovereign immunity doctrine does not bar the "vindication of constitutional guarantees" (Pet. 13-14); and (3) that the doctrine "should be abolished outright" (Pet. 14-17). None of petitioners' contentions warrants review.

Sovereign immunity bars judicial relief whenever, as in the present case, a plaintiff seeks relief against the government as compensation for past wrongs. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392 (1976); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949); cf. *Quern* v. *Jordan*, No. 77-841 (Mar. 5, 1979); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). That principle bars petitioners' claims. They cannot avoid the doctrine by their argument that they merely seek equitable relief (Pet. 11-12). As the court of appeals stated, "[a] plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money" (Pet. App. 25). See *Edelman* v. *Jordan*, *supra*, 415 U.S. at 658. What petitioners request here is a "traditional form of damages in tort—compensation for medical expenses to be incurred in the future" (Pet. App. 25). Petitioners' demand for medical examinations and care at the government's expense must be seen for what it is: a demand for the equivalent of money as

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sovereign immunity and could be pursued in this "extraordinary" case even though petitioners had not presented the claim to the military for agency action. The warning claim is currently pending in the district court. An additional claim for money damages against individual officers who held command positions during the 1953 testing was dismissed by the court and is pending on appeal. (The dismissal was certified as final under Fed. R. Civ. P. 54(b).)

compensation for harms incurred in the past.[2] It is barred by sovereign immunity. No court has accepted petitioners' contrary argument; there is no conflict in decisions requiring resolution here.

There is nothing to petitioners' suggestion that their assertion of constitutional violations abrogates the sovereign immunity doctrine. The source of the injury, or its nature, is irrelevant. Unless Congress has consented to the suit, sovereign immunity is a bar. This Court repeatedly has indicated that damages claims for constitutional violations are barred equally with other damages claims. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 691 n.11; *Duarte* v. *United States*, 532 F. 2d 850 (2d Cir. 1976); cf. *Alabama* v. *Pugh*, No. 77-1107 (July 3, 1978); *Quern* v. *Jordan*, *supra*.

Finally, petitioners ask that the sovereign immunity doctrine be abolished. But this Court has consistently held that the decision to retain or change the doctrine is committed to Congress. See, *e.g.*, *United States* v. *Testan*, *supra*, 424 U.S. at 399; *FHA* v. *Burr*, 309 U.S. 242, 244-245 (1940); *Keifer & Keifer* v. *RFC*, 306 U.S. 381, 389 (1939); *Federal Land Bank of St. Louis* v. *Priddy*, 295 U.S. 229, 231 (1935). That principle controls here.

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[2] A plaintiff could not avoid the doctrine of sovereign immunity by asking for relief in gold and jewels rather than money. Similarly, a form of payment in services readily available in the market for money should be treated as the equivalent of money. The sovereign immunity bar is avoided when, as in *Milliken* v. *Bradley*, 433 U.S. 267, 288-291 (1977), the transfer of money is simply ancillary to a prospective remedy—in that case, eliminating the continuing effects of racial discrimination. But the situation is quite different where, as here, there is a discrete tort (the 1953 test) and a discrete tort remedy (medical care), with the only deviation from the tort model being that the remedy is sought through in-kind services rather than through money.

Congress, of course, has consented to some damages suits against the United States based on the wrongful or negligent conduct of United States employees. See the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680. Petitioners have eschewed reliance on the Tort Claims Act, however, presumably because in *Feres* v. *United States,* 340 U.S. 135 (1950), this Court held that servicemen injured in the course of their duties are confined to their special military remedies and may not recover under the Tort Claims Act. Congress has left the *Feres* interpretation of the Tort Claims Act undisturbed for almost thirty years. See *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977). Petitioners should not be permitted to circumvent the *Feres* rule by the expedient of invoking the Constitution in place of the Tort Claims Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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